Editor's note: Reconsideration denied by Order dated Jan. 25, 1985

RICHARD W. ECKELS

IBLA 84-250 Decided October 18, 1984

Appeal from decision of the Montana State Office, Bureau of Land Management, establishing new priority date for over-the-counter oil and gas lease offer M-57693.

Affirmed.

1. Oil and Gas Leases: Applications: Filing -- Oil and Gas Leases: Rentals

   If the rental payment accompanying an over-the-counter noncompetitive oil and gas lease offer is deficient by less than 10 percent, and BLM requests submission of the deficient rental along with execution of special stipulations within 30 days, BLM may properly assign the offer a new priority as of the date the rental is submitted if the rental is not submitted within the 30-day period.

APPEARANCES: C. M. Peterson, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Richard W. Eckels has appealed from the December 15, 1983, decision of the Montana State Office, Bureau of Land Management (BLM), establishing a new priority date for over-the-counter oil and gas lease offer M-57693. Appellant's offer was submitted on January 20, 1983, and covered 9,837 acres. Appellant's offer, however, was accompanied by only $9,827 in rental. By notice dated October 3, 1983, the State office requested that appellant sign and return certain stipulations and submit the $10 deficient rental. The notice advised appellant that failure to furnish the additional rental within 30 days from receipt of the notice would result in rejection of his offer. On October 17, BLM received the executed stipulations along with a cover letter stating that a check for the $10 rental deficiency was also enclosed. The check, however, had been inadvertently omitted from appellant's submission. Appellant states that when he realized that he failed to include the check with the executed stipulations he forwarded check 4079 for the deficiency to BLM on November 1, 1983.

It is highly questionable whether it was deposited in the mail on November 1, however, as the check (which is dated October 12, 1983) and the transmittal letter (dated November 1, 1983) were received by BLM on December 5, 1983. On December 1 and 2 he had telephone conversations with BLM personnel, each of whom advised him that the delinquent payment had not been received. Following these conversations, when BLM received the rental deficiency on December 5, 1983, BLM assigned appellant's offer a new priority as of that date. The decision also noted that another offer for the same lands had been filed on July 13, 1983. Appellant insists that his priority should date from January 20, 1983, when his offer was originally filed.

Resolution of this appeal involves the application of Departmental regulation 43 CFR 3111.1-1(e)(1) (1982), which was in effect at the time appellant filed his offer. That regulation provided as follows:

> (e) Curable defects. An offer to lease containing any of the following deficiencies will be approved by the signing officer provided all other requirements are met:
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> (1) An offer deficient in the first year's rental by not more than 10 percent. The additional rental must be paid within 30 days from notice under penalty of cancellation of the lease.

A similar provision appeared at 43 CFR 3103.3-1 (1982). 1/ While appellant's offer was pending but prior to the issuance of the notice of deficiency, the Department's oil and gas leasing regulations were revised. The revised regulation concerning rental requirements is now codified at 43 CFR 3103.2-1(a) (1983), but the revision makes no change that would have any substantive effect on the disposition of this appeal:

> An offer deficient in the first year's rental by not more than 10 percent or $200, whichever is less, shall be accepted by the authorized officer provided all other requirements are met. Rental submitted shall be determined based on the total amount remitted less all required fees. The additional rental shall be paid within 30 days from notice of the deficiency under penalty of cancellation of the lease.

Appellant reads the language in the regulations to require a two-step approach. Where an offer is deficient in the first year's rental: (1) The offer will be approved by the signing officer; and (2) the additional rental must be paid within 30 days from notice under penalty of cancellation of the lease. Appellant construes this to require BLM to issue the lease and then provide appellant 30 days in which to pay the deficiency. According to appellant, the regulation makes no provision for rejection of the lease or loss of priority if the rental is deficient.

1/ That regulation provided as follows: "An offer deficient in the first year's rental by not more than 10 percent will be approved by the signing officer provided all other requirements are met. The additional rental must be paid within 30 days from notice under penalty of cancellation of the lease."

Appellant's argument, however, fails to give appropriate emphasis to the fact that approval of a lease is required if the rental deficiency is merely nominal only when "all other requirements are met." Thus, the Department is required to accept an offer accompanied by nominally deficient rental only when no other action would bar issuance of the lease. This is not the circumstance presented in the instant appeal. Appellant's offer was not fully qualified for lease issuance because special stipulations needed to be executed. In a case involving essentially the same factual situation, Dean W. Rowell, 55 IBLA 301 (1981), the Board found that rejection of the lease application was consistent with the regulatory requirements. The Board noted:

> The intent of this regulation is to provide an offeror, who is otherwise fully qualified for the lease to issue, with a 30-day notice of a nominal rental deficiency of less than 10 percent, and to grant only that amount of time to correct the deficiency. The appellant in this case was not yet fully qualified for lease issuance at the time the rental deficiency notice was given. To hold as appellant suggests could require BLM to give seriatim notices of each deficiency, each with an additional 30 days to cure the deficiency. This would be patently impractical.
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> Further, there is nothing in this regulation that requires issuance of a lease before notice of a rental deficiency is given. In the present case, when BLM issued its decision of October 2, 1979, the lease could not properly be issued because the special stipulations had not yet been signed and, therefore, all the requirements had not been met. By the terms of the decision of October 2, 1979, which appellant received, he was given a 30-day period to cure the rental deficiency. Appellant was given adequate notice of the deficiency, specifically informed of the consequences of nonpayment, and given ample time to submit the additional $3. When he failed to pay the additional rent within the required time, BLM properly rejected the offer and closed the case. See Hansen Brothers, 42 IBLA 40 (1979); Zona R. Jackson, 27 IBLA 217 (1976); Albert J. Finer, 27 IBLA 61 (1976).
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> There is, therefore, no merit in appellant's contention that he was entitled to another 30-day period pursuant to a billing after lease issuance. This practice would, in effect, grant him more than the normal 30 days envisioned by the regulation. Moreover, to require BLM to issue a lease with a second notice would be a useless repetition of an action already taken and would in effect provide appellant with a 60-day period to correct this deficiency. [Emphasis in original.]

Id. at 303.

Nevertheless, appellant disagrees with the analysis of the Rowell decision, and contends that when he submitted the executed stipulations all the requirements relative to his offer were complete and suggests that the regulations require that an offer will be approved by the signing officer in such a situation. Even if we were to accept appellant's theory that the

Department was required to issue the lease when the stipulations were received, this would not help appellant, since under the regulations, BLM would be required to immediately cancel that lease when appellant did not pay the deficiency within the 30-day period after notice provided by the regulation.

Appellant had already been given the required 30-day notice of the deficiency and the time period had elapsed. There is absolutely no language in the regulation which supports a claim that appellant would be entitled to another notification and another 30-day period in which to reply.

While appellant contends that the Rowell decision does not present a proper interpretation of the regulation, its intent, purpose and years of Departmental practice, appellant has failed to identify a precedent for requiring BLM to issue a second notice of deficiency. Appellant notes that "the Rowell appeal was pro se and the issues were not adequately presented by the appellant to this Board" (Statement of Reasons at 8). Regardless of the adequacy of the advocacy in the Rowell appeal, the Board's decision represents a complete analysis of the relevant issues. Despite the myriad arguments appellant raises against application of the Rowell decision, we are not persuaded that he was entitled to a second notice of deficiency and another period in which to pay the rental in order to retain his priority over that of another applicant.

Contrary to appellant's position, we do not regard the instant situation as an example of "unfair administration of the leasing program through penalty of an offeror for petty, trivial or inadvertent errors" (Statement of Reasons at 10). The oil and gas leasing program often places the Government in a role of a stakeholder for competing applicants for the same parcel of land. The competing applications are submitted with the expectation that the rules governing adjudication of those applications will be strictly followed. It would be manifestly unfair for the Department to bend its rules to allow one applicant to obtain priority over another.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

The language of 43 CFR 3111.1-1(e) should govern the outcome of this case, not BLM's dubious practice of requesting deficient rentals before approval of a lease or this Board's equally dubious decision in Dean W. Rowell, 55 IBLA 301 (1981), accommodating that practice at the expense of the regulation.

The regulation provides that, if all other requirements are met, an offer to lease "will be approved" where the first year's rental is less than 10 percent deficient, subject to cancellation if the additional rental is not paid within 30 days of notice.

In this case BLM sent appellant both a request for additional stipulations to be signed along with the lease offer and a notice of $10 deficiency in rental at the same time. Appellant signed the offer and the stipulations but overlooked enclosing a check for the deficient rental. When the signed stipulations were received, all other requirements for approval of the offer were met, i.e., only the defect of deficient rental remained to be cured. According to the regulation the lease should have issued.

In my view, the matter of deficient rental should be dealt with by BLM only upon approval and issuance of the lease. At the time of issuance the lessee should be sent a notice of the deficiency stating that the lease will be canceled if the rental is not paid within 30 days of the notice. Such a procedure would avoid the necessity of sending a second notice of deficiency when the lease issues that deducts the number of days since the first notice from the 30 days allowed by the regulation for paying the deficient rental. However, since the regulation provides the lease will issue, if a notice of deficient rental has been sent before issuance, a second notice is required. Contrary to the reasoning in Rowell, it would not, indeed should not, provide another 30 days for payment but only so many days remaining of the original 30 days as have not been consumed between receipt of the first notice and issuance of the lease. Thus, in this case, where appellant received the first notice on October 11 and returned the signed offer and stipulation on October 17, he should have been issued a lease on October 17 along with a second notice giving him 24 days to submit payment of the $10 deficiency.

Had the correct procedure been followed, I am confident appellant would have caught his mistake in time to cure the deficient rental.

I dissent.

Will A. Irwin
Administrative Judge